NGUANG CHAN SDN BHD

v.

PP

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
ABDUL HAMID MOHAMAD JCA
ABDUL KADIR SULAIMAN JCA
[CRIMINAL APPEAL NO: W-05-28-2000]
8 MARCH 2001

CONSTITUTIONAL LAW: *Prosecution - Prosecution by authority other than Attorney General - Prosecution by assistant controller under s. 28B(3) Trade Descriptions Act 1972 - Whether prosecution contravenes art. 145 Federal Constitution - Whether s. 28B(3) ultra vires art. 145*

CRIMINAL PROCEDURE: *Prosecution - Prosecution by authority other than Attorney General - Prosecution by assistant controller under s. 28B(3) Trade Descriptions Act 1972 - Whether prosecution contravenes art. 145 Federal Constitution - Whether s. 28B(3) ultra vires art. 145*

The accused company was charged with two offences under the Trade Descriptions Act 1972 ('TDA') in the Magistrate's Court. An Assistant Controller of Trade Descriptions ('the Assistant Controller') appeared in court to conduct the prosecution of the case. The issue to be decided in these appeals was whether s. 28B(3) of the TDA was *ultra vires* art. 145(3) of the Federal Constitution ('FC') and hence the prosecution conducted therewith a nullity.

Held:
Per Lamin Mohd Yunus PCA

[1] Article 145(3) FC states categorically that the FC confers the Attorney General ('A-G') with the power to institute, conduct or discontinue any proceedings for an offence "other than proceedings before a syariah court, a native court or a court-martial." His power relates to proceedings for both seizable and non-seizable offences from a Magistrate's Court to the Federal Court.

[2] The A-G is the sole authority having power to institute, conduct and discontinue prosecutions and proceedings for all offences under the Penal Code. Prosecution of all offences under other written laws shall be governed by the Criminal Procedure Code ('CPC') but may be subject to any written law regulating the manner or place of inquiring into or trying such offences.

[3] There is nothing in s. 28B(3) TDA to suggest that the Assistant Controller when acting under the section is obliged to get either written authorisation or consent from the A-G or any Deputy Public Prosecutor. It appears that he is allowed to act independently, under the general supervision of the Controller who in turn is under the general direction and control of the Minister.

[4] The learned judge in the present case did not view the case as being instituted by a public servant. The learned judge held that since the complaint was made by a public officer in his official capacity it was unnecessary for the magistrate to examine him on oath, and in such a case a presumption could arise that the complaint was made by an officer under the control and direction of the Federal A-G acting as Public Prosecutor consonant with art. 145 FC and s. 376(1) CPC.

[5] There was, however, no avenue for such a presumption to operate here. Section 28B(3) TDA is *ultra vires* art. 145(3) FC. As the prosecution was conducted by an Assistant Controller under s. 28B(3) TDA it was in contravention of art. 145(3) FC and was thus a nullity.

[Appeal by Attorney General dismissed; appeal by accused company allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Syarikat tertuduh telah dipertuduhkan atas dua kesalahan di bawah Akta Perihal Dagangan 1972 dalam Mahkamah Majistret. Seorang Penolong Pengawal Perihal Dagangan hadir bagi mengendalikan pendakwaan kes tersebut. Isu yang harus diputuskan adalah samada s. 28B(3) tersebut adalah *ultra vires* per. 145(3) Perlembagaan Persekutuan dan pihak pendakwaan mengendalikan sesuatu yang tak sah.

Diputuskan:
Oleh Lamin Mohd Yunus PMR

[1] Perkara 145(3) secara mutlaknya menyatakan bahawa Perlembagaan Persekutuan menganugerahkan Peguam Negara kuasa untuk memulakan, mengendalikan atau memberhentikan sebarang prosiding bagi sesuatu kesalahan "other than proceedings before a syariah court, a native court or a court-martial". Kuasa beliau berkaitan dengan prosiding untuk kedua-duanya kesalahan boleh ditangkap dan tidak boleh ditangkap daripada Mahkamah Majistret kepada Mahkamah Persekutuan.

[2] Peguam Negara adalah pihak berkuasa tunggal yang mempunyai kuasa untuk memulakan, mengendalikan dan memberhentikan pendakwaan dan prosiding bagi kesemua kesalahan di bawah Kanun Keseksaan. Pendakwaan kesemua kesalahan di bawah undang-undang tertulis yang lain akan dikuasai oleh Kanun Prosedur Jenayah (KPJ) tetapi ianya mestilah

tertakluk kepada sebarang undang-undang bertulis yang melaraskan cara atau tempat menyiasat mengenai atau membicarakan kesalahan-kesalahan yang sedemikian.

[3] Tidak terdapat apa-apa dalam s. 28B(3) Akta 1972 tersebut untuk menyarankan bahawa penolong Pengawal ketika bertindak di bawah seksyen tersebut bahawa beliau adalah sesungguhnya berkewajipan untuk mendapatkan samada kebenaran bertulis atau persetujuan daripada Peguam Negara atau mana-mana Timbalan Pendakwa Raya. Nampaknya beliau telah dibenarkan untuk bertindak secara bebas, di bawah penyeliaan am oleh Pengawal tersebut yang mana adalah sebaliknya di bawah arahan am serta kawalan Menteri.

[4] Hakim yang bijaksana dalam kes semasa ini tidak melihatnya sebagai dimulakan oleh seorang pegawai awam. Sebaliknya, hakim yang bijaksana berpendapat bahawa oleh kerana aduan tersebut telah dibuat oleh seorang pegawai awam dalam kedudukan rasminya ianya adalah tidak perlu bagi majistret tersebut memeriksa beliau atas sumpah dan dalam kes yang sedemikian suatu tanggapan mungkin akan berbangkit bahawa aduan telah dibuat oleh seorang pegawai di bawah kawalan dan arahan Peguam Negara Persekutuan yang bertindak sebagai seorang Pendakwa Raya sejajar dengan per. 145 dan s. 376(1) KPJ.

[5] Mahkamah Rayuan semasa tidak melihat sebarang laluan bagi tanggapan yang sedemikian berlaku. Seksyen 28B(3) Akta 1972 adlah *ultra vires* per. 145(3). Oleh kerana pendakwaan telah dikendalikan oleh seorang Penolong Pengawal di bawah s. 28B(3) Akta 1972 ianya telah melanggari per. 145(3) dan merupakan sesuatu yang tak sah.

[Rayuan oleh Peguam Negara ditolak; rayuan oleh syarikat tertuduh dibenarkan.]

Case(s) referred to:

Johnson Tan Han Seng v. PP [1977] 2 MLJ 66 ***(refd)***
Kyohei Hosol v. PP [1998] 1 CLJ 1063 ***(refd)***
Long Samat & Ors v. PP [1974] 2 MLJ 152 ***(refd)***
Perumal v. PP [1970] 2 MLJ 265 ***(refd)***
PP v. Bata (M) Bhd [2000] 3 CLJ 433 ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 2 MLJ 116 ***(refd)***
PP v. Jamil Jilap [2000] 5 CLJ 368 ***(refd)***
PP v. Lee Ming & Ors [1999] 1 CLJ 379 ***(refd)***
PP v. Pengurus, MBf Building Services Sdn Bhd [1998] 1 CLJ 678 ***(refd)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 30(1)
Criminal Procedure Code, ss. 3, 18, 133(1), 376(i), 377(b), 380(ii)(b)
Employees Provident Fund Act 1951, s. 18(1)
Federal Constitution, arts. 4(1), 145(3), 160
Forest Ordinance (Cap 126) (Sarawak), s. 92A
Immigration Rules 1963, s. 39(b)
Immigration Act 1959 & 1963, ss. 55B(1)(3), 58(2)
Securities Commission Act 1993, s. 39(1)
Securities Industry Act 1983, ss. 86, 126(2)
Trade Descriptions Act 1972, ss. 3(1)(b), 18(2), 26(2), (3), 28B(3)
Wild Life Protection Ordinance (Sarawak), s. 39

Other source(s) referred to:
Criminal Procedure in Malaysia, Mimi Kamariah Majid, 2nd edn, pp 131-141

Criminal Appeal No: W-05-28-2000
For the appellant - Cyrus Das (K Mohan with him); M/s Shook Lin & Bok
For the respondent - Vong Poh Fah

Criminal Appeal No: W-05-29-2000
For the appellant - Vong Poh Fah
For the respondent - Cyrus Das (K Mohan with him); M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Criminal Application No: 44-7-98]

Reported by Yow Ting Fong

JUDGMENT

Lamin Mohd Yunus PCA:

For the purpose of the deliberation on the cases before us we reproduce below the text of cl. (3) of art. 145 of the Federal Constitution:

> 145(3) The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a syariah court, a native court or a court-martial.

This clause states categorically that the Federal Constitution, the supreme law of the land, confers the Attorney-General with the power to institute, conduct or discontinue any proceedings for an offence "other than proceedings before a syariah court, a native court or a court-martial" because of the words "shall have power". However, he can only exercise that power pertaining to proceedings only in a civil court because the clause expressly does not allow him to appear in other courts namely any syariah court in the country, the native court and any court-martial. Of course to institute a proceeding etc. shall be at his discretion. His power relates to proceedings "for an offence" in a civil court meaning in our view from a magistrate court to the highest civil court in the country namely the Federal Court.

Next if we may observe, cl. (3) concerns itself only with proceedings "for an offence". The word "offence" is not qualified as to whether it is seizable or non-seizable offence. From the reading of the clause, its intention can be no other than to confer the Attorney-General with a general power to institute etc and so the word "offence" must cover both seizable and non-seizable offences.

The next question, it may be asked, whether the word "offence" refers to any offence as prescribed under any law Federal or State. (Of course matters within the jurisdiction of a syariah court, a native court or a court-martial are outside the purview of the Attorney-General). It would appear to be affirmatively so. Does this make the Attorney-General the exclusive authority or the sole authority in the whole country having the power to "institute, conduct or discontinue" any proceedings in any civil court? Clause (3) does not stipulate an offence under "any law". The words "any law" do not appear in cl. (3), however. Otherwise, it would have been to that extent clearer for in terms of definition under art. 160, they would "include" any "written law" be it in force "in the Federation or any part thereof". If such had been the case, any law passed after Merdeka Day which was "inconsistent with" the Federal Constitution would immediately attract art. 4(1) of the Constitution and it would be struck down as being void to the extent of its inconsistency. Both the Federal and State legislatures have been known to have enacted laws investing certain Federal and State authorities with the power to conduct prosecutions for offences as prescribed in the respective acts and enactments some of which have been brought before the court and dealt with as each court thought appropriate or correct. (Some such laws are eg, Securities Industry Act 1983, Securities Commission Act 1993 see *Repco Holdings Bhd. v. PP* [1997] 4 CLJ 740; Environmental Quality Act 1974 see *PP v. Pengurus, MBf Building Services Sdn. Bhd.* [1998] 1 CLJ 678; Immigration Act 1959/63 see *Kyohei Hosol v. PP* [1998] 1 CLJ 1063; Forest Ordinance (Sarawak Cap. 126); Wild Life Protection Ordinance (Sarawak), see *PP v. Lee Ming & Ors* [1999] 1 CLJ 379; Sabah Forests Enactment 1968 see *PP v. Jamil bin Jilap* [2000] 5 CLJ Supp 368).

Perhaps the omission of the words "any law" in cl. (3) was intentional. In so far as the prosecution of offences under the Penal Code there is no doubt that the Attorney-General is the sole authority having the power of control and direction in respect of it.

The Criminal Procedure Code (CPC) makes express provisions as spelt out in s. 376(i) of the CPC and it reads:

> (i) The Attorney-General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this code.

As is provided for under cl. (3) of art. 145 of the Federal Constitution, the Attorney-General has been invested by the supreme law of the land with the power "to institute, conduct or discontinue any proceedings for an offence" and s. 3 of the CPC stipulates "All offences under the Penal Code **shall be inquired into and tried** according to the provisions" of the CPC (emphasis added) while the officer responsible for the control and direction of "all criminal prosecutions and proceedings" in respect of "all offences under the Penal Code" is the Public Prosecutor and the Attorney-General "shall be" the Public Prosecutor (s. 376(i) CPC).

So for all offences under the Penal Code, it is the Attorney-General who is the sole authority having the power to institute, conduct and discontinue their prosecutions and proceedings. (For the meaning of the words "institute", "conduct" and "discontinuance" see *Perumal v. PP* [1970] 2 MLJ 265 (FC), *PP v. Datuk Harun bin Hj. Idris & Ors* [1976] 2 MLJ 116 and Mimi Kamariah Majid on *Criminal Procedure in Malaysia*, 2nd edn pp. 131-141.)

Now, what about the prosecutions and proceedings of offences under any other law. By what procedure are they governed and who has the power of control and giving directions in respect of them. Section 3 of the CPC states:

> 3. **Trial of offences under the Penal Code and other laws.**
>
> All offences under the Penal Code shall be inquired into and tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into and tried according to the same provisions subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences.

The second limb of this section provides that "and all offences under any other law shall be inquired into and tried according to the same provisions: subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences." It is quite clear from this provision that the prosecution of "all offences" under other written laws shall be governed by the "same provisions" of the Criminal Procedure Code but they may be subject to any written law "regulating the **manner** or **place** of inquiring into or trying such offences." Likewise it appears, therefore s. 376(i) CPC will also govern the prosecution of all offences under any other law meaning its "control and direction" are also in the hands of the Attorney-General because it says he has the power of "control and direction of all criminal prosecutions and proceedings under this code". However other written laws may only regulate "the manner or place of inquiring into or trying such offences".

That is not the end of the matter. We have s. 380 of the CPC to contend with and to give effect to. It reads:

380. Prosecutions in summary non-seizable cases

Notwithstanding anything in this Chapter contained:

(i) any public officer may prosecute in any Court in any case or class of cases in which he is by any written law authorised to prosecute in such Court;

(ii) in summary non-seizable cases in the court of a Magistrate:

(a) the Public Prosecutor or a Deputy Public Prosecutor or a Police Officer may appear and conduct any prosecution;

(b) any officer of any Government department or to any local authority or statutory authority or any person employed by any local authority or statutory authority may appear and conduct any prosecution for an offence against any written law which it is the duty of the said department or authority specially to enforce;

(c) any private person may appear in person or by advocate or, in the State of Terengganu, by a pleader and prosecute for an offence against his own person or property.

Under s. 380(ii)(b), any officer of the Government department or any local authority or statutory authority or any person employed by any of them is authorised to appear and conduct any prosecution for an offence "against any written law which it is the duty of the said department or authority specially to enforce". This subsection was inserted in 1967 (s. 18 CPC Amendment Act 25/67). We believe it was initiated to ease the heavy burden of the Attorney-General and his officers and to allow the officers of the respective government departments and statutory authorities to conduct the prosecution of minor offences (non-seizable) against their relevant laws. The constitutional validity of this provision is questionable especially when the section (s. 380) is prefixed with the words "Notwithstanding anything in this Chapter contained ...". The effect of this is to oust the powers of the Attorney-General under s. 376(i) to control and direct all criminal prosecutions. Perhaps this is permissible. But more importantly it stands in the face of his general powers under art. 145(3) of the Federal Constitution and will immediately attract art. 4(1) of the Constitution. In April 1998 under the Amendment Act A1015 the whole s. 380 was completely amended and replaced with a new s. 380 which reads:

> 380. Notwithstanding anything in this Chapter contained, any private person may appear in person or by advocate and prosecute for an offence against his own person or property in a non-seizable case in the Court of a Magistrate.

This new s. 380 requires no further discussion as it has become irrelevant in the context of the present case. However in the same Amendment Act 1998 s. 377 was amended by substituting for paras (a) and (b), completely new paras (a) and (b). The new para (b) is, in our view, constitutionally palatable because the person named therein such as an officer of any Government department,

an officer of any local or statutory authority and any person employed by them may conduct prosecution but must be authorised in writing by the Public Prosecutor and while still remaining under his control and direction. Paragraph (b) reads:

> (b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorised in writing by the Public Prosecutor:
>
> (1) an advocate;
>
> (2) a police officer not below the rank of Inspector;
>
> (3) an officer of any Government department;
>
> (4) an officer of any local authority;
>
> (5) an officer of any statutory authority or body; or
>
> (6) any person employed or retained by any local authority or any statutory authority or body.

With this new para (b), it emphasises further the position of the Attorney-General as regards his overall authority "to institute, conduct or discontinue" any proceedings for an offence exercisable at his discretion. In our view whether with or without the 1998 amendment, the powers of the Attorney-General under art. 145(3) of the Federal Constitution remains unaffected.

The instant case before us originated in a Magistrate Court Kuala Lumpur where a private limited company, Nguang Chan Sdn. Bhd. was charged on 21 March 1995 with two offences (committed on 25 November 1994) both being offences under s. 3(1)(b) of the Trade Descriptions Act 1972 (Act 87) punishable under s. 18(2) of the Act. An Assistant Controller of Trade Descriptions appeared in court to conduct the prosecution of the case. Before the trial concluded the learned magistrate transmitted the record of proceedings to the High Court and placed before it for determination the following questions namely:

> 1. Whether section 28B(3) of Act 87 which allows proceedings to be conducted by an Assistant Controller of Trade Descriptions is *ultra vires* Article 145(3) of the Federal Constitution;
>
> 2. Whether the institution by the Assistant Controller of Trade Descriptions of proceedings under the said Act contravenes Article 145(3) of the Federal Constitution.

Section 28B(3) of the Act reads:

> (3) Any prosecution in respect of an offence under this Act may be conducted by an Assistant Controller.

As we shall also be discussing the effect of s. 26 in relation to s. 28B(3) for convenience we reproduce sub-ss. (2) and (3) of s. 26 of the Act. They read:

> (2) The Controller shall subject to the general direction and control of the Minister have supervision in all matters relating to the enforcement of this Act and the controller and the Deputy Controller shall perform such duties and exercise such powers and functions conferred upon him and upon an Assistant Controller by this Act.
>
> (3) All officers appointed under this section shall be deemed to be public servants within the meaning of the Penal Code applicable.

There is nothing to suggest from s. 28B(3) of the Trade Descriptions Act 1972 that the Assistant Controller when acting under sub-s. (3) that he is obliged to get either written authorisation or consent from the Attorney-General or any Deputy Public Prosecutor. It appears he is allowed to act independently. However he is under general "supervision" by the controller who in turn the controller himself is under "the general direction and control of the Minister" when performing his functions such as supervising "in all matters relating to the enforcement of this Act." (see s. 26(2)).

In *Repco Holdings Bhd v. Public Prosecutor ("Repco")* [1997] 4 CLJ 740 Gopal Sri Ram JCA (sitting as High Court Judge) was faced with the question as to whether sub-s. (2) of s. 126 of the Securities Industry Act 1983 ("the SIA") and sub-s. (2) of s. 39 of the Securities Commission Act 1993 ("the SCA") were in conflict with art. 145(3) of the Federal Constitution. If we may reproduce the whole s. 126 of SIA and s. 39 of the SCA as follows:

Section 126 of the SIA reads:

> 126 (1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.
>
> (2) A prosecution for any offence against any provision of this Act may be conducted by the Registrar or by any officer authorized in writing by the Registrar or by any officer authorized in writing by the Chairman of the Commission.

Section 39 of the SCA reads

> 39(1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.
>
> (2) Any officer of the Commission authorized in writing by the Commission may conduct any prosecution of any offence under this Act.

The learned Deputy Public Prosecutor cited before the court a couple of celebrated authorities namely *Long bin Samat and Ors. v. PP* [1974] 2 MLJ 152 and *Johnson Tan Han Seng v. PP* [1977] 2 MLJ 66 where Suffian LP in both cases made his notable contributions in his judicial pronouncements in

regard to the position and powers of the Attorney-General as found in the Federal Constitution. We have but great respect for all his propositions in this respect. Gopal Sri Ram JCA had this to say (p. 748):

> The importance of the propositions formulated by the learned Lord President in these two cases is that as a matter of public law, the exercise of discretion by the Attorney-General in the context of Article 145(3) is put beyond judicial review.

In *Repco* a public limited company was charged for making certain statement which the Securities Commission considered having contravened s. 86 of the Securities Industry Act 1983 and the Commission then instituted proceedings against it. On the day of hearing in the Sessions Court Kuala Lumpur, counsel for Repco took a preliminary objection to the *locus standi* of the two officers (Ms. Foo Lee Mei and Ms. Seow Siew Mei) of the Commission who appeared to conduct the prosecution. As the arguments involved constitutional issues, the session judge adjourned the hearing and transmitted the record to the High Court under the authority of s. 30(1) of the Courts of Judicature Act 1964 to determine the constitutionality of the two subsections mentioned earlier. It was argued that they were *ultra vires* art. 145(3) of the Federal Constitution. Gopal Sri Ram JCA declared that the two subsections were *ultra vires* of art. 145(3) and therefore null and void. With regard to sub-s. (2) of s. 126 of SIA he had this to say (p. 749):

> In my judgment, having regard to the authorities read before me, the expression 'conduct' appearing in art. 145(3) and in the two impugned subsections carries the same meaning. Since the Constitution exclusively authorizes the Attorney-General to conduct prosecutions, it must follow, as night follows day, that no other authority may be lawfully empowered to exercise that function. Therefore, it is my opinion, that s. 126(2) of the SIA is *ultra vires* art. 145(3) of the Federal Constitution save to the extent I shall now indicate.
>
> Subsection (2) of s. 126 of the SIA refers to the conducting of a prosecution by the Registrar of Companies or by someone authorized by such Registrar in writing. As a matter of practice, the Registrar of Companies is usually a senior member of the Judicial and Legal Service. He or she is normally gazetted as a deputy public prosecutor. So, if the Registrar of Companies is gazetted deputy public prosecutor and in such capacity conducts a prosecution of an offence under the SIA, that would not be caught by art. 145(3) of the Constitution. But the Chairman of the Securities Commission is not placed on an equal footing. He is therefore not authorized lawfully, that is to say constitutionally, to authorize or to conduct prosecutions under the SIA.
>
> Neither does s. 380(i) of the CPC, relied on by the prosecutors before the sessions court, provide any assistance to the Securities Commission. As pointed out by the learned deputy public prosecutor, the expression 'public officer' appearing in that section refers to members of the public service. While for

the purpose of carrying out their duties, members and servants of the Securities Commission are deemed to be public officers, they do not fall within the scope of s. 380(i) of the CPC.

(Section 381 CPC mentioned above was the one inserted by 1967 amendment)

With regard to s. 39 of the SCA, if we may observe that in the light of sub-s. (1), we wonder why it was necessary to have sub-s. (2) at all. With a clear injunction in sub-s. (1) that "no prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor" then the whole of sub-s. (2) would have no legal effect. However sub-s. (2) was deleted in 1998 by Act A 1041.

In *Kyohei Hosoi v. PP* the learned judge of the High Court Kuala Lumpur, with a similar issue at hand found in *Repco* the answer. The case concerned a constitutional question as to whether s. 58(2) of the Immigration Act 1959/1963 was *ultra vires* of art. 145(3) of the Federal Constitution. Two persons were charged for an offence under s. 39(b) of the Immigration Rules 1963 and s. 55B(1)(3) of the Immigration Act 1959/1963 ('the Act') respectively in the Magistrates' Court at Melaka. Both prosecutions were instituted pursuant to sanctions to prosecute given by the Director General of Immigration in accordance with s. 58(2) of the Act which reads:

(2) No prosecution shall be instituted in respect of an offence against this Act without the sanction in writing of the Director General or of the Public Prosecutor or his Deputy.

The learned magistrate stayed the proceedings and transmitted the record to the High Court under s. 30(1) of the Courts of Judicature Act 1964 for determination as to the constitutionality or otherwise of the sub-s. (2) in the face of art. 145(3) of the Federal Constitution. The learned judge relied wholly on the decision of *Repco* and declared that s. 58(2) of the Act was *ultra vires* of art. 145(3) of the Federal Constitution.

Similarly if we may observe the Immigration Act 1959/1963 does not have a clear injunction as in the form and substance as in sub-s. (1) of s. 39 of the Securities Commission Act 1993. So the learned judge in *Kyohei Hosoi* made a ruling only affecting that part of sub-s. (2) of s. 58 of the Immigration Act 1959/1963 for he said (p. 1070):

The result of s. 58(2) of the Act giving power to, *inter alia*, the director general of immigration to sanction the institution of a prosecution means that his power is parallel to that of the Attorney General. As I said earlier art. 145(3) of the Federal Constitution confers this power exclusively on the Attorney-General. In the premises that part of s. 58(2) of the Act which empowers the director general of immigration to sanction a prosecution is inconsistent with art. 145(3) of the Federal Constitution.

In *Lee Ming*, the learned judge of the High Court, Kuching had to decide on the constitutionality of s. 92A of the Forests Ordinance (Sarawak Cap. 126) and s. 39 of the Wild Life Protection Ordinance (Sarawak). In that case, both the accused were originally charged in the Sessions Court under the Forests Ordinance (Sarawak) and the Wild Life Protection Ordinance (Sarawak) and the prosecution was conducted by a legal officer of the State Attorney General Chambers Mr. Lim Heng Choo. The Sessions Court Judge followed *Repco* and ruled that the prosecuting officer had no written authorisation to prosecute and thus the trial was declared a nullity. The Public Prosecutor brought the case up to the High Court by way of revision with the view to have the decision of the Sessions Court Judge revised. The prosecuting officer had relied on a written authority dated 18 May 1996 to prosecute signed on behalf of the Director of Forests and Director of Wild Life. The letter of authorisation certified and confirmed that Mr. Lim was "lawfully entitled to discharge the function of a forest officer" under "the Forests Ordinance particularly s. 92A of the said Ordinance."

Section 92A reads:

> Prosecution in respect of offences under this Ordinance or by any subsidiary legislation made hereunder may be conducted by:
>
> (a) The State Attorney General or any legally qualified officer authorized by him;
>
> (b) The Director; or
>
> (c) Any forest officer or any other public officer generally or specially authorized in that behalf by the Director.

Ian Chin, J decided thus:

> That provision is surely, in the light of *Repco Holdings Bhd v. PP* [1997] 3 MLJ 681, which I respectfully follow, unconstitutional, null and void as it allows persons other than the Federal Attorney General to institute, conduct or discontinue any proceedings for an offence. Therefore, whatever the nature of the authorization that was given pursuant to that provision did not clothe the prosecution officer with authority to prosecute. In this regard, the learned sessions court judge was right in concluding that the prosecution was a nullity.
>
> This brings me to the third charge which is under s. 22(2) of the Sarawak Wild Life Protection Ordinance. The offence was for being in possession of a protected plant which carries a sentence of imprisonment of one year and a fine of RM25,000. The provision enabling prosecution in that Ordinance is in the following section:

> 39. Prosecutions in respect of offences committed under this Ordinance or any rule made hereunder may be conducted by a Wild Life Officer, or by any other person specially authorized in writing in that behalf by the Director.

In my view, that provision suffers the same unconstitutionality and nullity because it vested prosecutorial authority on a person other than the Federal Attorney General and without the Federal Attorney General having any discretion in the institution, conduct or discontinuance of the proceedings under the Sarawak Wild Life Protection Ordinance.

Before the sessions court, the learned Deputy Public Prosecutor relied on s. 380(ii)(b) CPC (ie, as amended by s. 18 of the CPC Amendment Act 1967 (Act 25/67) – We have reproduced earlier). He submitted that since the prosecuting officer was an officer of a government department, he was entitled to prosecute. The two offences at the time of commission (4 August 1993) and by definition then were non-seizable offences and therefore they came within the meaning of s. 380(ii)(b) CPC. The learned judge then decided thus:

> ... It is clear from the wording of s. 380(ii)(b), which I have earlier reproduced, that the conduct of prosecution was taken totally out of the hands of the Federal Attorney General and vested in officers of Government department, local authority or statutory authority and there is not even a need to obtain sanction to prosecute from the Attorney General. It must follow from the decision of *Repco Holdings Bhd v. PP* that s. 380(ii)(b) is also unconstitutional and a nullity. Not only that, every legislation, be it State or Federal, which attempts to clothe any person other than the Federal Attorney General with the power to institute, conduct or discontinue any prosecution for an offence would also be unconstitutional and a nullity.

As we have said earlier that the purpose of the amendment by bringing in s. 380(ii)(b) CPC was in our own judgment an attempt not to burden the Attorney General with less serious matters or day-to-day matters that can appropriately be dealt by the respective departments and local and statutory authorities such as by allowing them to carry out the prosecution of non-seizable offences in other written laws specially affecting the duties and responsibilities of the respective departments and authorities. We certainly agree with the above suggestion but their powers should still be subject to the powers of the Attorney General as laid down in s. 376(i) CPC. Perhaps the words:

> notwithstanding anything in this Chapter contained –

that govern s. 380 CPC be replaced with the words "subject to s. 376(i)." This has in fact been done by the 1998 amendment and it is now found in the new para (b) to s. 377 CPC. Since the amendment in 1967, the powers to conduct prosecution of offences in other written laws by various officials other than the Public Prosecutor and his deputies have not been seriously challenged

until *Repco*. That suggests that the Attorney General was prepared to allow those other authorities to conduct the prosecution of offences in those other laws so that the problems connected therewith would expeditiously be resolved.

In the light of the above, we do not think it is necessary to discuss the decision in the case of *PP v. Bata (M) Bhd.* [2000] 3 CLJ 433 where the learned judge held a view contrary to that held in *Lee Ming* and *Jamil Jilap*. The learned judge in *Bata* was dealing with the operation of s. 18(1) of the Employees Provident Fund Act 1951 and to ascertain as to whether the conduct of a prosecution by an EPF officer under the said section contravened art. 145(3). Section 18(1) reads:

> Prosecutions in respect of any offence against the provisions of this Act or of any regulations or rules made thereunder may be conducted by any officer in writing in that behalf by the Chairman of the Board.

There is just another matter. The learned judge in the present case in his grounds of judgment (Reported in [2000] 4 AMR 3927 at p. 3933) did say this:

> I now move to the second question, whether the institution by the Assistant Controller of Trade Descriptions of proceedings under the Act contravenes Article 145(3). The short answer to this is, if the Assistant Controller of Trade Descriptions was the person who took the initiative to institute the proceedings, then the proceedings are a nullity.
>
> But did he institute the proceedings? The record shows that a Magistrate issued a summons on February 10, 1995 in respect of the charges for the two offences against the accused company. It was issued on a written complaint lodged by a public servant, in this case Assistant Controller of Trade Descriptions, Mohd Rabani Hj Sayur. The summons was issued under Chapter XV of the CPC.

In the present case, the judge did not view it as a case being "instituted" by a public servant who was the Assistant Controller of Trade Descriptions otherwise as he had said the proceedings would have been a nullity. To him, the case emerged into court as a result of a written complaint lodged by the Assistant Controller of Trade Descriptions, Mohd. Rabani Hj. Sayur and then a summons was issued by a magistrate under Chapter XV of the CPC. Since the complaint was lodged by a public servant and not by a private person then sub-s. (1) of s. 133 CPC before the amendment did not apply so that his complaint need not be examined on oath before the issuance of the summons for he said:

> It was not necessary to examine the officer acting in his official capacity as the complaint was made on an official basis and the presumption was that the complaint made under the CPC was made by an officer under the control and direction of the Federal Attorney General acting as Public Prosecutor consonant with Article 145 and s. 376(1) of the CPC.

To the learned judge since the complaint was made by a public officer in his official capacity and it was not necessary for the magistrate to examine him on oath and in such a case a presumption could arise in that the complaint was made by an officer under "the control and direction" of the Federal Attorney-General acting as a Public Prosecutor consonant with art. 145 and s. 376(1) of the CPC". For one thing it is not clear in the mind of the judge whether by "lodging" a complaint it could or could not amount to "instituting" a proceeding. Be that as it may in our own view, with the greatest of respect we see no avenue for a presumption to operate here. In the present case, it was clear that the prosecution was **conducted** by an Assistant Controller of Trade Descriptions and he had his purported authority to do so under s. 28B(3) of Act 87 to do so and as we have said it was clearly in contravention of art. 145(3) of the Federal Constitution. So the prosecution was a nullity. There was no way that he could hide under or get the protection of s. 376(i) in view of what we said of the effect of s. 380 CPC before the 1998 amendment.

That is all that is required to be said about the proceedings. However by lodging a complaint as was done by the Assistant Controller, did not help to salvage the case in any way. By so doing it could be said he did institute the proceeding. However whatever action he took he would still be under the "supervision" of the controller (s. 26(2)) which would be "subject to the general direction and control of the Minister" and therefore in direct conflict with art. 145(3) and to that extent the said provision would be struck down as null and void art. 4(1).

In the circumstances we therefore rule that s. 28B(3) of Act 87 is *ultra vires* of art. 145(3) of the Federal Constitution and that the prosecution conducted was null and void.

In the result the appeal by the Attorney-General as per notice of appeal dated 27 April 2000 is dismissed.

The appeal by the accused's company as per notice of appeal dated 27 April 2000 is allowed.